(3)

No. 01-120

In the Supreme Court of the United States

COALITION OF NEW JERSEY SPORTSMEN, INC.; BOB'S LITTLE SPORTSHOP, INC.; SPRINGFIELD, INC.; ARMALITE, INC.; ROBERT L. VIDEN, JR.; STEPHEN D. MCCLURE; JOHN DOE I, II, III, IV, V, VI, VII, VIII, & IX,

Petitioners

v.

DONALD T. DIFRANCESCO, Acting Governor, *et al.*,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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ARGUMENT

1. A clear circuit conflict has emerged concerning the standards to be applied in a pre-enforcement vagueness challenge to criminal provisions which lack scienter. The Third Circuit in this case, like the Second in *Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681, 684-86 (2nd Cir. 1996), hold that a strict analysis is not warranted unless the First Amendment (or another selected constitutional right) is implicated. By contrast, the Sixth and Ninth Circuits hold that a strict review is warranted. *Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250 (6th Cir. 1994); *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522 (6th Cir. 1998); *Forbes v. Napolitano*, 236 F.3d 1009, 1011-12 (9th Cir. 2000).

All of the above cases involved prohibitions on possession of "assault weapons" except for *Forbes*, which concerned a prohibition on specified medical procedures on certain fetal tissue. *Id.* Nothing in this Court's jurisprudence suggests that a different rule of law would apply for such *mala prohibita* crimes.

Like the Second and Third Circuits, respondent disregards this Court's precedents other than *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489 (1982), which is selectively quoted only to refer to the following: "In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Id.* at 494, quoted in Respondents' Br. in Opp., 6.

Thus, the issue of constitutionally-protected conduct is only the "first step," not the last step, as New Jersey would have

it.[1] Moreover, New Jersey and the opinions it relies on invariably ignore the following further analysis in *Hoffman Estates*:

> [E]conomic regulation is subject to a less strict vagueness test . . . . The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.

Id. at 498-99.

Nor is *Hoffman Estates* the only precedent that applies. "A criminal statute may be facially invalid even if it has some conceivable application." *Springfield Armory*, 29 F.3d at 252, citing *Kolender v. Lawson*, 461 U.S. 352, 358-59 n.8 (1983); *Colautti v. Franklin*, 439 U.S. 379, 395 (1979). A law is facially vague where it violates "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Chicago v. Morales*, 527 U.S. 41, 60 (1999). Where "vagueness permeates the ordinance, a facial challenge is appropriate." *Id.* at 60.55 n.22.

New Jersey's statute cannot withstand application of the

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[1] The Third Circuit has long held that "the right of the people to keep and bear arms" in U.S. Const., amend. II, does not protect any individual right. *Tot v. United States*, 131 F.2d 261, 266 & n.13 (3rd Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943). *But see United States v. Emerson*, 2001 U.S. App. LEXIS 22386, *146 (5th Cir. 2001) ("the Second Amendment protects the right of individuals to privately keep and bear their own firearms").

above criteria. Outlawing some 66 named firearms (plus "series" and "type") and all those that are "substantially identical," on its face, sets no standard for either consumers or law enforcement. How would a consumer know that a firearm possessed is "substantially identical" to a firearm that such person neither has access to nor is even aware of? And how would the police know what is or is not "substantially identical" except by making up specifics as they go?

New Jersey argues that no circuit conflict exists because the laws at issue here and in the Sixth Circuit cases contain variations. Yet New Jersey's law fails the vagueness test even more clearly than did that in *Springfield Armory*, which referred to "other models by the same manufacturer with the same action design that have slight modifications or enhancements." 29 F.3d at 251. This narrowed its coverage by referring to the same manufacturer (the name of which would be engraved on the firearm) and the same "action design," while New Jersey's law refers to "substantially identical" without reference to anything.

Moreover, as explained in Judge Merritt's opinion in *Springfield*, "the ordinance is fundamentally irrational and impossible to apply consistently by the buying public, the sportsman, the law enforcement officer, the prosecutor or the judge." *Id.* This was true even though the crime had a "knowledge" element.[2] Finally, the penalties here are far harsher than the 6 month maximum jail in the Sixth Circuit

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[2] *Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 534 (6th Cir. 1998) (noting that the former version in *Springfield* prohibited "knowingly selling or possessing an assault weapon").

cases:[3] imprisonment for three to five years. New Jersey Statutes (N.J.S.), §§ 2C:39-5f, -9g, 2C:43-6a(3).

New Jersey argues that pre-enforcement review should be deferred while prosecutions continue and perhaps the State's Supreme Court renders opinions. This would only ruin the lives of those prosecuted while the standards of review and the circuit split remain unresolved. Indeed, the need for this Court's clarification is exemplified in the recent decision in *State v. Petrucci*, 779 A.2d 429, 2001 N.J. Super. LEXIS 311, *14-15 (N.J. Super., App. Div. 2001), which agreed with the Third Circuit that "substantially identical" is not vague but included an analysis showing that the fact finder must arbitrarily decide that issue based on a potentially limitless array of facts.[4]

For the above reasons, this Court should resolve the circuit conflict concerning the standards to be applied in a vagueness challenge of criminal laws lacking scienter. This is particularly needed as a result of the proliferation of firearms prohibitions which, instead of describing features that the ordinary person can understand – such as barrel length measured in inches or the firearm's basic mechanism – list scores of exotic names without defining a single feature, and

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[3] *Peoples Rights Organization*, 152 F.3d at 528.

[4] *Petrucci* concerned whether a Chinese Norinco rifle was "substantially identical" to the Russian "AKM," a model of the "Avtomat Kalashnikov" which is listed in the New Jersey law. A State witness testified that it was, but listed 11 different features of the two rifles, beginning with the radical difference that the AKM is full automatic while the Norinco is only semiautomatic. He further testified to numerous variations in the "Avtomat" and to dissimilarities in appearance and function. *Id.* at *4-6. While *Petrucci* was remanded for trial, its discussion of the particulars clarifies that the phrase "substantially identical" sets no standard.

then essentially add "and other stuff like that."

2. The Act bans firearms according to the names imprinted on them, not according to any objective features. Respondent argues as if the names describe specific firearms, Br. 11-12, when in fact New Jersey has conceded that any firearm with a listed name is banned regardless of its features or the removal of any features. New Jersey admitted in the trial court:

> The Act prohibits Springfield from selling in New Jersey any firearm, no matter what its features, with the words "Springfield Armory BM59 and SAR-48" inscribed on them. . . . . The firearm so marked could be a .22 caliber single shot, but it would still be illegal.

Pls.' State. of Material Facts, Defs.' Counter State. of Material Facts ¶ 9. *See further* Pet. for Cert., 19-20.

The district court acknowledged that "the indirect effect of these listings are that manufacturers who wish to engage in business in New Jersey are restricted (in a very minor way) how they can name such a weapon." App. 60a. However, this Court in *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404, 2428 (2001), clearly stated:

> The Court of Appeals recognized that the efficacy of the regulation was questionable, but decided that "in any event, the burden on speech imposed by the provision is very limited." . . . *There is no de minimis exception for a speech restriction that lacks sufficient tailoring or justification.* We conclude that the restriction on the height of indoor advertising is invalid under *Central Hudson*'s third and fourth

prongs. (Emphasis added.)

The referenced criteria of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), are that the speech restriction must directly and materially advance the asserted governmental interest, and that there must be a reasonable fit between the means and ends of the regulatory scheme. *Lorillard Tobacco*, 121 S. Ct. at 2428; *Central Hudson*, 447 U.S. at 564, 569. The banning of names without any relation to the design or features of an article, and regardless of how the design may be changed or the features removed, cannot meet that criteria.

Moreover, the ban is on mere possession, not on advertising. The Act restricts pure speech, not just commercial speech.

New Jersey argues that the "substantially identical" clause saves the name ban from depriving persons of equal protection of the laws. Br. 14-15. Not so. The Attorney General invented a criteria of generic features for firearms that are "substantially identical" and opined that such firearms can be removed from the Act simply by removing such features. However, this does not "apply to firearms that are specifically listed in *N.J.S.A.* 2C:39-1w(2) as prohibited firearms." Cir. App. 171-73a (Dept. of Law and Public Safety, March 31, 1997). Any firearm imprinted with a condemned name is plagued with original sin and can never escape its damnation.

New Jersey protests that it cannot name every one of what it wishes to ban and that banning a few scores of names plus "other stuff like that" is the best it can do. No where in its brief does it articulate exactly what features it finds objectionable or address why it does not simply adopt generic definitions describing those features. Its failure to do so simply does not override the protections of free speech and equal

protection.

3. "Freedom of association . . . plainly presupposes a freedom not to associate." *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2451 (2000). While New Jersey does not dispute this principle in the abstract, it argues that only a rational basis need be found for requiring one to join a private club in order to retain property that the State would otherwise prohibit. Br. 16. However, "State action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958).

Nor has New Jersey articulated even a rational basis for the club-membership requirement. It speculates that the legislature "linked retention of such weapons . . . with membership in clubs where they might properly be used." Br. 17. No such linkage exists. In fact, the only specific "legitimate target-shooting purposes" for assault firearms mentioned in the Act are "competitive shooting matches sanctioned by the Director of Civilian Marksmanship [DCM]." N.J.S. 2C:58-12a. Membership in a club is not a condition for eligibility for participation in the Civilian Marksmanship Program. *See* § 1613, Tit. XVI, 104 P.L. 106, 110 Stat. 186 (1996). "All US citizens 16 years of age or older," without any requirement of club membership, may enter DCM matches. 32 C.F.R. § 544.30(a), (b).

In *Besig v. Dolphin Boating & Swimming Club*, 683 F.2d 1271, 1276 (9th Cir. 1982), a private club maintained facilities on public property, but the club allowed non-members to use its facilities. The court rejected a First Amendment claim on the following basis:

> Notwithstanding appellants' persistence in arguing under a nonassociation theory, they

> simply are not deprived of their right not to associate. *They need not join any club.* Nonmembers have been granted access to club facilities. That the access may be on less favorable terms than that granted to members may present other questions, but use of the club facilities does not depend on club membership or club association.

Id. (emphasis added). By contrast, the law in *Gavett v. Alexander*, 477 F. Supp. 1035 (D. D.C. 1979), "absolutely barred non-members from participating in the government-provided benefit."[5] *Besig*, 683 F.2d at 1276. That is the case here.

New Jersey argues that it could ban assault firearms altogether, and thus it could require preexisting owners to join gun clubs in order to retain their property. Br. 18. However, *Hetherton v. Sears, Roebuck & Co.*, 652 F.2d 1152, 1157-58 (3rd Cir. 1981), explains:

> While it may be true that Delaware could ban the sale of all deadly weapons, it does not follow that the State, *having abrogated its power to effect a total ban, can arbitrarily establish categories of persons who can or cannot buy the weapons*. . . . The question then is whether it is rational for Delaware to limit sales to persons who know two Delaware freeholders and can produce them as witnesses. We think that this question must be answered in

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[5] *Gavett v. Alexander*, 477 F. Supp. 1035, 1044-45 (D. D.C. 1979), invalidated the NRA membership requirement for purchase of a military rifle from the DCM. Contrary to New Jersey's suggestion, Br. 6, *Gavett* mentioned but did not consider the validity of a separate local club-membership requirement. *Id.* at 1042.

the negative. (Emphasis added.)

Similarly, the question here is whether New Jersey can limit retention of lawfully-acquired property to persons who can convince private clubs to accept them as members. This Court's jurisprudence suggests that this violates the rights of association and of equal protection.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Third Circuit.

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